Cook DuPage Transportation Company *and* Amalgamated Transit Union, Local 1028, AFL–CIO.
Cases 13–CA–44649 and 13–CA–44861

June 4, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On February 12, 2009, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondent filed a reply brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed __ U.S.L.W. __ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for rehearing filed Nos. 08-1162, 08-1214 (May 27, 2009).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Schaumber does not agree that any decision to lay off employees would be a per se mandatory subject of bargaining. However, he agrees that under extant Board law, which he applies for institutional reasons, the Respondent's decision to lay off or terminate employees was a mandatory subject of bargaining in the circumstances of this particular case, and the Respondent violated Sec. 8(a)(5) by failing to give the Union advance notice and opportunity to bargain about this decision.

[3] We shall modify the judge's recommended Order and notice to conform to the Board's standard remedial language. Those employees who were unlawfully laid off or terminated by the Respondent shall be made whole for any loss of earnings and other benefits as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Cook DuPage Transportation Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or terminating employees for economic reasons in the bargaining unit represented exclusively by Local 1028, Amalgamated Transit Union, AFL–CIO, or eliminating the Respondent's standby driver program, without providing the Union timely notice and an opportunity to bargain about those decisions and their effects. The bargaining unit is:

> All full-time and regular part-time drivers employed by us at our facility currently located at 1200 W. Fulton, Chicago, Illinois, but excluding all clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

(b) Refusing to provide the following information requested by the Union that is necessary for and relevant to its obligation to bargain on behalf of the employees it represents: a list of drivers and their current and proposed schedules; an explanation of how the schedules are adjusted; and the attendance records of all its drivers.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before laying off or terminating bargaining unit employees for economic reasons, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above over the layoff or termination decision and its effects.

(b) Before eliminating the standby driver program, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above over the elimination of the standby driver program decision and its effects.

(c) Reinstate the standby driver program that was unlawfully eliminated.

(d) Within 14 days from the date of this Order, to the extent that it has not already done so, offer the following employees and other similarly situated employees immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Kenya Brown	James Martin
Patrece Byrd	Leroy Mitchell
Cortez Cosey	Roselyn Morris
Kathy Davis	Charles Mosley
Rubbie Davis	Latasha Nelson
Letrice Fairley	Nicole Pringle
Carmelita Gipson	Romie Prude
Joyce Harper	Crystal Rucker
Yolanda Harris	Lenora Sandifer
Antoinette Hartley	Chinetta Smith
Byron Henderson	Lashon Smith
Joseph Hopson	Billie Suttles
Marilyn Jackson	Tiffany Thompson
Tiffany Jennings	James Tucker
Arthur Johnson	Mirriam Wear
Tiffany Johnson	Sandra Wear
Jimmie Kimble	Charissa Wells
Brian King	Latricia Wherry
Emma King	Gwen Williams
Carol Lee	Shalon Woods

(e) Make whole the unit employees named above in subparagraph 2(d), and other similarly situated employees, for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct, in the manner set forth in the remedy section of the judge's decision, as amended.

(f) Furnish to the Union in a timely manner the following information requested by it: a list of drivers and their current and proposed schedules; an explanation of how the schedules are adjusted; and the attendance records of all its drivers.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 13 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 2008.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 4, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay off or terminate employees in the bargaining unit represented by Local 1028, Amalgamated Transit Union, AFL–CIO, for economic reasons or eliminate its standby driver program without providing the Union timely notice and an opportunity to bargain about those decisions and their effects. The bargaining unit is:

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All full-time and regular part-time drivers employed by us at our facility currently located at 1200 W. Fulton, Chicago, Illinois, but excluding all clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to provide the following information requested by the Union that is necessary for and relevant to its obligation to bargain on behalf of the employees it represents: a list of drivers and their current and proposed schedules; an explanation of how the schedules are adjusted; and the attendance records of all of our drivers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, before laying off or terminating bargaining unit employees for economic reasons, and before eliminating the standby driver program, notify and, on request, bargain with the Union as the exclusive bargaining representative of employees in the bargaining unit described above over the layoffs or terminations and the decision to eliminate the standby driver program, and the effects of those decisions.

WE WILL reinstate the standby driver program, which we unlawfully eliminated.

WE WILL, within 14 days from the date of this Order, to the extent that we have not already done so, offer the following employees and other similarly situated employees immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Kenya Brown	James Martin
Patrece Byrd	Leroy Mitchell
Cortez Cosey	Roselyn Morris
Kathy Davis	Charles Mosley
Rubbie Davis	Latasha Nelson
Letrice Fairley	Nicole Pringle
Carmelita Gipson	Romie Prude
Joyce Harper	Crystal Rucker
Yolanda Harris	Lenora Sandifer
Antoinette Hartley	Chinetta Smith
Byron Henderson	Lashon Smith
Joseph Hopson	Billie Suttles
Marilyn Jackson	Tiffany Thompson
Tiffany Jennings	James Tucker
Arthur Johnson	Mirriam Wear
Tiffany Johnson	Sandra Wear
Jimmie Kimble	Charissa Wells
Brian King	Latricia Wherry
Emma King	Gwen Williams
Carol Lee	Shalon Woods

WE WILL make the employees listed above, and other similarly situated employees, whole for any loss of earnings and other benefits suffered as a result of their unlawful layoff or termination, or as a result of the elimination of the standby program, plus interest.

WE WILL furnish to the Union in a timely manner the following information requested by it: a list of drivers and their current and proposed schedules; an explanation of how the schedules are adjusted; and the attendance records of all of our drivers.

COOK DUPAGE TRANSPORTATION COMPANY

Charles J. Muhl, Esq., of Chicago, IL, for the General Counsel.
Leonard R. Kofkin and *Donald J. Vogel, Esqs. (Scopelitis, Garvin, Light, Hanson & Feary),* of Chicago, IL, for the Respondent.
Robert S. Cervone, Esq. (Dowd, Bloch and Bennett), of Chicago, IL, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Chicago, Illinois on December 15, 2008. The complaint alleges that Respondent violated Section 8(a) (5) and (1) of the Act by laying off or terminating some 40 employees and by eliminating its past practice of placing unit employees who missed an excessive number of workdays on "standby" status and instead laying off or terminating them, without giving the Charging Party Union prior notice and affording the Union an opportunity to bargain about the above decisions and the effects of those decisions. The complaint also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with related information, which was necessary for and relevant to the Union's responsibilities as the exclusive bargaining representative of Respondent's unit employees. The Respondent filed an answer denying the essential allegations in the complaint.

After the trial, the General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record in this case, including the testimony of the witnesses, and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and a place of business located in Chicago, Illinois, provides transit and paratransit services. During a representative one-year period, Respondent derived gross revenues in excess of $250,000, and purchased and received, at its Chicago facility, products, goods and materials valued in excess of $5,000 directly from points outside the state of Illinois. Accordingly, I find, as admitted, that Respondent is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent transports disabled people, mostly within the City of Chicago, pursuant to contracts with the Regional Transportation Authority (RTA), a governmental agency, or its constituent service boards, including the Chicago Transit Authority (CTA) and PACE. In carrying out its contractual responsibilities, Respondent employs between 400 and 500 drivers. Tr. 97-98, 36–37.

Respondent's most recent contract to transport disabled people was with PACE and it was executed on December 14, 2007. Tr. 104. PACE, which had operated the suburban para-transit operation, apparently took over all such operations throughout the Chicago area, including within the city. For a contractor such as Respondent, which had previously operated within the city, under contracts with the CTA, this presaged significant changes. Those changes, however, were reflected in PACE's solicitation of bids for the work, which was issued in early 2007. Respondent submitted a bid under the new solicitation and won a portion of the total contract. Two of the major changes in the bid solicitation were the addition of more transportation contractors and restrictions in the covered geographic area for each contractor. Prior to the new contract, a disabled person could use any one of three contractors, regardless of where he lived. The new contract provided that each contractor would operate in a particular geographic zone; Respondent's zone is the central zone, within the City of Chicago. Tr. 105-107. Because of these changes, five contractors provided the same service that previously had been provided by three. Thus, the 2007 PACE contract reduced the volume of business for the three previous contractors, including Respondent. Tr. 107-108.

The new PACE contract also provided that the contractors were to be paid by the hour rather than by the trip. It provided that the contractors would dispatch their drivers under a new computerized system called Trapeze. Under that system, a customer calls a PACE telephone number the day before his trip giving the starting and ending times and locations of the trip. That information is then provided to Respondent by computer, in a way that generates a schedule for each vehicle used by Respondent. Each vehicle has a monitor reflecting the pick-ups and drop-offs for each driver. Tr. 54–55,108–109. PACE had used Trapeze in its suburban para-transit operation and wanted to use it in the city. Tr. 109. The implementation of Trapeze, as well as the other changes mentioned above, were incorporated into the solicitation of bids so that Respondent and the other bidding contractors knew of the changes when they bid on the work in early 2007. Tr. 107–109. Indeed, Respondent's vice-president and part owner, Tim Jans, knew, at this point, that the PACE changes would potentially result in less business for Respondent and, consequently, the need for fewer drivers. Tr. 128–129.

The PACE contract went into effect on March 29, 2008. Prior to implementation of the new contract with PACE, Respondent utilized drivers to run assigned regular shifts, with peak volume in the morning rush hours and again in the afternoon rush hours. For at least some five or six years, Respondent had an existing practice that also utilized drivers for a standby shift. Those drivers, who had previously been full time regular drivers, reported either at 7:15 am or 2:45 pm, and filled in, as needed, if drivers were unable to drive their regular shifts. The standby drivers who were not utilized as regular shift drivers were paid for one hour of work and sent home. Tr. 100–103. The list of standby drivers varied from zero to eight or more. Tr. 103. The standby driver program acted in a way as a disciplinary policy for regular drivers who had chronic attendance problems. According to Respondent's vice-president and part owner, Tim Jans, drivers were placed on the standby schedule because of their "horrendous attendance, and to save their job and to give the company a little flexibility." Tr. 100. If a driver placed on standby improved his attendance, he could be reinstated to a regular driver's schedule; if he did not, he was terminated. As more fully explained below, except for reference to the standby driver program, there is no record evidence that drivers were terminated for excessive absenteeism.

B. Respondent's Bargaining with the Union

Respondent's drivers had apparently been represented by the Union's predecessor for a number of years until, at some point, they chose not to be represented. Sometime in 2006, after a Board election, the Union was certified as the bargaining representative of the drivers; and the Respondent and the Union commenced bargaining for a collective bargaining agreement in October 2006. Since then, the parties have met numerous times, but, at the time of the trial, the parties had not succeeded in reaching an agreement. The main negotiators were Tim Jans for the Respondent and Attorney Robert Cervone for the Union.

By February 9, 2007, the parties had reached a number of tentative agreements (Tr. 40), including a provision governing layoffs, which were to be implemented at least in part based on seniority (Tr. 58, 111). Another tentative agreement was Article Eighteen, which dealt with "bidding for shifts, work schedules, extra work opportunities and standby."[1] The language with respect to use of standby drivers ameliorated the definition of excessive absenteeism previously relied upon by Respondent to place drivers on standby and included the Union's proposal that approved leave and vacations would not count as occurrences in determining excessive absenteeism. The language also included the Union's proposal that the standby drivers be given two hours' pay, rather the existing one hour's pay, if they were not given a regular route. Tr. 43. At some point before the parties reached a tentative agreement on standby drivers, the Respondent expressed an interest in eliminating the practice of utilizing standby drivers, but the Union rejected that proposal (Tr. 49). On October 30, 2007, the Union called a brief strike (Tr. 50), after which all tentative agreements were rescinded. Still later, according to Union Attorney Robert Cervone, the tentative agreements of February 7, 2007 were reinstated, including the provision and language dealing with

[1] The provision was identified in the record as General Counsel's Exhibit 1 and appears in the exhibit list immediately after the formal papers, which were also identified as General Counsel's Exhibit 1.

standby drivers. Tr. 81–83. Jans agreed that most tentative agreements were reinstated, but testified that some were not, including Article Eighteen. Tr. 114.

On March 3, 2008, the parties again discussed attendance. The Respondent suggested a contract provision on attendance similar to that the Union had in another contract with a competitor of Respondent. That provision provided guidelines for dealing with attendance problems, including a progressive discipline procedure ultimately resulting in termination. Cervone took the Respondent's proposal under advisement, but there was no agreement on the matter. Cervone said that the Union might be agreeable to such a proposal "in the context of an overall contract." Tr. 52. See GCX 2, Tr. 50–53.

The parties next met on March 21, 2008. According to Jans' bargaining notes, on that occasion, the parties spent about an hour "going over new PACE contract changes." RX 1. According to those notes, the parties also discussed representation of non-drivers who would be operating the Trapeze computer system and the discharge of an employee who had filed an NLRB charge. RX 1. This was not the first time the parties had discussed the Trapeze system. It had been discussed in bargaining sessions as early as July 2007. Tr. 55. At that point, the new bid solicitation process with PACE had been initiated and publicized, and, during the course of bargaining, the parties had discussed that Respondent's geographical territory would be diminished, which could result in a reduction of business, and, in turn, a reduction in Respondent's workforce. Tr. 59.

The next bargaining session took place on April 11, 2008, about two weeks after the PACE contract went into effect. At that meeting, the parties again discussed the Trapeze system, which had already apparently been implemented. Jans mentioned problems Respondent had had in implementing the system. He wanted to change drivers' schedules so that they better reflected the decrease in peak activity in the morning and evening hours and more realistically reflected trips that took place in the middle of the day. Tr. 55. Cervone reminded Jans that the parties had tentatively agreed upon a procedure for drivers' schedules based on seniority and bidding. But the parties discussed possible changes, including use of the bidding procedure used in the Union's contract with one of Respondent's competitors. The parties did not reach an agreement on that issue. Tr. 55–56.

The parties then moved on to the issue of attendance, including use of attendance in placing drivers on standby. Tr. 56. Jans suggested eliminating the standby driver provision that had earlier been tentatively agreed upon and again mentioned handling attendance problems in the way they were handled in the Union's contract with Respondent's competitor. Cervone repeated his earlier view that the Union would probably agree with that suggestion, but it was not ready to do so at this time. Tr. 56. The parties also discussed productivity from a disciplinary standpoint, which had also been the subject of an earlier tentative agreement. Jans said that that provision was no longer necessary because implementation of the Trapeze system, which provided that all drivers had a manifest of trips in their vehicle, removed productivity as an issue. The parties reached no agreement on this issue. Thereafter, the Respondent made a new wage proposal, which the Union took under advisement.

Toward the end of the April 11 meeting, Jans said that he was going to have to reduce his vehicle load from 250 to 200, and, that as a result, he was going to be laying off or terminating drivers. He did not mention the number of drivers that would be affected, but said he was going to choose the drivers he was going to release based on their attendance. Cervone reminded Jans that the parties had a tentative agreement on how to handle layoffs, based on seniority, but, if Respondent was not going to follow that agreement, the Union wanted to bargain over the decision and the effects of the decision, including the basis of the selection process. Tr. 57–58. Jans did not respond, but indicated he had to leave the meeting. Cervone and the other union negotiators then caucused separately to discuss the matters Jans had raised at this meeting. After the caucus, Cervone called Jans and told him that the Union wanted to bargain over the proposed changes in schedules but that he needed some information, such as the current schedules and what changes were proposed both long term and short term. Tr. 59–60. Cervone also objected to any layoffs or terminations and repeated that the Union wanted to bargain over the decision and its effects, as well as the selection of the drivers who were to be released. He also asked for information on that issue, including the names of the drivers Jans was proposing to release, a seniority roster, and the attendance records for all employees. Tr. 61. Later that same day, Cervone followed up his telephone conversation with an e-mail to Jans confirming the Union's positions on bargaining and on the information requests. GCX 3. [2]

C. The Layoffs, Elimination of the Standby Driver Program and Other Meetings

In separate fax messages from April 14 through April 21, 2008, Respondent notified the Union that it had terminated 40 employees in accordance with Jans' notification to the Union at

[2] The above is based primarily on the testimony of Union counsel Cervone, whose testimony was more reliable and detailed than that of Jans, the only other witness. Cervone's testimony is substantially in accord with that of Jans and consistent with all three sets of notes taken of the crucial April 11 bargaining session—one by Jans, one by Cervone, and one by another union representative. The main point of disagreement between Cervone and Jans is whether Jans used the term layoff, as Cervone testified, or the term discharge or fire, as Jans testified. As discussed more fully elsewhere in this decision, I do not believe the terminology used to describe the personnel actions that followed the April 11 meeting, including the exact words used in the meeting, is determinative. It is likely that each participant testified as to what they thought they said or heard. But I found Jans generally to be an unreliable witness, in contrast to my assessment of Cervone as a witness. It seemed to me, based on my assessment of his demeanor, that Jans was primed to avoid using the term layoff because he thought, erroneously, by the way, that avoiding using the term would aid him in advancing his legal position. He was quite evasive in initially insisting that he fired 40 drivers for cause in April of 2008, and only reluctantly conceded later in his testimony that the decision was basically motivated by economic considerations, as reflected in the position statements provided by Respondent in connection with the investigation of this case. Tr. 112, 129–130, GXC 8 and 10. Finally, as shown in footnote 4 below, I also found Jans' testimony inconsistent or unreliable on other matters, such as why he recalled the drivers and why he did not contest their unemployment compensation applications.

the April 11 bargaining session. GCX 4. The fax messages listed the employees that it had terminated, along with the number of days each had "missed" since January 1, 2007. Those employees were indeed terminated and notified separately that they had been "discharged" for "unsatisfactory attendance." GCX 12. As I have indicated above, I found Jans's testimony about the reasons for the release of the 40 employees generally unreliable. I find, in accordance with Respondent's position statements, which described the personnel actions of April 2008 as reductions in force, with Jans' reluctant acknowledgement later in his testimony, and with the entire record in this case, that the reason for the personnel actions was Respondent's loss of business due to the new PACE contract, particularly the reduction of the number of contractors performing the services involved and the resultant decrease in the need for drivers. I find therefore that the personnel actions of April 2008 were not discharges for cause. Indeed, both Respondent's failure to contest the unemployment applications of the laid off employees and its subsequent recall of them a little over two months later because, according to Jans, it needed more drivers confirm that these employees were not discharged for cause. I find instead that Respondent used a two step procedure to cut its work force in April of 2008. First, it decided it needed fewer drivers for economic reasons; and then, it decided to select both the number of, and the particular, drivers it would release, unilaterally, based on which of the drivers had the worst absenteeism records. I find therefore that the personnel actions of April 2008 were economically based layoffs, terminations or reductions in force.

In late April and in early May, Cervone made follow-up requests for the information that he had earlier requested from Jans. GCX 5 and 6. In one e-mail exchange, Jans indicated that drivers' schedules had not changed "except for a few volunteers," and that it was not yet clear what the permanent schedules would be. He also indicated that he had sent Cervone "the names of the drivers that I laid off" and stated that Respondent had "no further plans to lay off any other drivers at this time." GCX 6.

The parties met again on June 11 and on July 22, but were unable to reach agreement. At the June 11 meeting, Cervone asked whether any of the laid off drivers had been recalled. Jans said they were not laid off, but were fired for poor attendance. Tr. 68. According to Cervone's uncontradicted testimony, Jans also said that he had eliminated the standby driver program and terminated everyone who was on standby when he terminated the other drivers the month before. Tr. 69. According to Jans, there were about five drivers on standby in April of 2008 and they were among the 40 drivers terminated at that time. Tr. 103–104.[3]

As set forth above, prior to Respondent's elimination of the standby driver program, Respondent had used the program effectively to discipline regular drivers with an excessive number of absences. Indeed, in response to the General Counsel's subpoena, Respondent provided documents that were introduced into evidence, showing that employees with excessive absenteeism were placed on standby status for a period of 30 days. If, during that period, the driver missed "any days", he would be terminated; and, if his attendance improved, he could be reinstated to a regular work schedule. GCX 11, Tr. 123. Another set of documents, also provided pursuant to subpoena and admitted into evidence, shows that the Respondent's terminations for attendance over a period of years had nothing to do with the number of days of work missed; they dealt primarily with job abandonment. Nothing in those terminations indicated whether the drivers were on standby when they were terminated. Tr. 125–126, GCX 13.

On July 3, 2008, Respondent sent letters to the laid off drivers offering them immediate reinstatement to their former positions. GCX 7. Some 10 to 15 employees apparently accepted those offers. Tr. 74. According to Jans, at some point after the April 2008 terminations, Respondent needed more drivers; too many drivers had been terminated in April. Tr. 115, 118. Jans testified that Respondent could not hire new drivers because it was more difficult to get new drivers with the driving credentials required by PACE than to recall the terminated drivers who already had those credentials. Tr. 118–119. Later, in response to questions from his attorney, Jans testified that the July 3 reinstatement offers were sent, at the behest of Respondent's lawyer, in order to toll back pay. Tr. 121–122, 160.[4]

At the July 22 meeting, Jans provided Cervone with a sample of the July 3 letter that was sent to the laid off drivers offering them reinstatement. Also included with that letter was a list of the laid off drivers and their status at the time, as well as a list of the schedules for the reinstated drivers. GCX 7. This was apparently in response to Cervone's inquiry as to whether Jans had any additional information that the Union had requested. Tr. 75. After a brief discussion, during which Cervone protested that he would like to have been involved in the recall procedure, he was assured by Jans that no existing drivers would be displaced by the returning drivers. Tr. 74.

D. Response to the Union's Information Requests

Except as indicated above, the Respondent did not respond to the Union's information requests. According to Cervone's uncontradicted testimony, the only information the Respondent provided was a list of the laid off employees and a seniority roster. The Union did not receive a list of the current schedules of all drivers or what the new schedules would be; an explanation of how the schedules were to be adjusted; or the attendance records of all the drivers. Tr. 76–79. Jans admitted that he did not provide any of this information. Tr. 141–142.

[3] In response to one of my questions, Jans said he had not used the standby driver system since April of 2008 because there was "no practical way of using it." Tr. 118. I took that to be an effective admission that Jans eliminated the standby driver program. He had no standby drivers to use because he had terminated them all. Jans said nothing about how he would handle excessive absenteeism among the regular drivers in the future. He had, of course, terminated the 40 drivers with the worst absenteeism records as of April of 2008.

[4] Jans' inconsistent testimony about the reasons for recalling the laid off employees is another indication of his unreliability as a witness. I also found unreliable his self-serving explanation of why he did not contest the unemployment applications of the employees, whom he allegedly discharged for cause. See Tr. 159–160.

III. DISCUSSION AND ANALYSIS

It is well settled that an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing the wages, hours and other terms and conditions of employment of represented employees—mandatory subjects of bargaining—without first providing their bargaining representative with notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz,* 369 U.S. 736 (1962). Mandatory subjects of bargaining include those matters that are "plainly germane to the 'working environment'" and "not among those 'managerial decisions, which lie at the core of entrepreneurial control.'" *Ford Motor Co. v. NLRB,* 441 U.S. 488, 498 (1979). The decision to lay off employees for economic reasons is clearly a mandatory subject of bargaining. Thus, absent extraordinary situations involving "compelling economic circumstances," an employer must provide notice to and bargain with the union representing its employees concerning both the layoff decision and the effects of that decision. *Lapeer Foundry & Machine, Inc.,* 289 NLRB 952, 954–955 (1988), citing numerous authorities, including *NLRB v. Advertisers Mfg. Co.,* 823 F.2d 1086 (7th Cir. 1987). See also *Tri-Tech Services,* 340 NLRB 894, 895 (2003); and *Pan American Grain Co.,* 351 NLRB 1412 (2007). Indeed, contrary to Respondent's position,[5] "termination of employment" has long been considered a mandatory subject of bargaining. *N.K. Parker Transport, Inc.,* 332 NLRB 547, 551 (2000), citing *Ryder Distribution Resources,* 302 NLRB 76, 90 (1991), which involved failure to bargain over the discharge of employees.

In addition, where, as here, the General Counsel shows that an employer made a material and substantial change in a term of employment without negotiating with the union, the burden is on the employer to show that such a unilateral change was in some way privileged. *Pan American Grain,* above, 351 NLRB at 1414, fn. 9. Indeed, where, as here, the parties are in negotiations, an employer's obligation goes beyond simply giving notice and an opportunity to bargain over mandatory subjects; absent "economic exigencies," it "encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991). No one contends there was an overall impasse in this case.

It is clear on this record that the terminations or layoffs in April 2008 were, whatever their characterization, economically based and thus mandatory subjects of bargaining under the Board's *Lapeer* rationale. They were actuated by a need for Respondent to reduce its business and cut the number of its drivers, thus implicating a decision that turned on labor costs.[6] The Respondent's terminations also included the drivers on standby status. The Respondent's purported need to rid itself of employees turned out to be ephemeral in any event because just over 2 months later, according to Jans, it needed additional drivers and it asked the laid off drivers to return. Some did. Yet Respondent did not give the Union the opportunity to have input not only on the purported need to release drivers, but how it was done. Both the Board in *Lapeer* and the Seventh Circuit in *Advertisers Mfg*. have confirmed that such decisions and their effects are uniquely subjects for bargaining, particularly where, as here, they turn on labor costs. In this case, Respondent terminated the employees unilaterally, denying the Union's request to bargain about both its decision to terminate and the effects of that decision. It decided to cut some 40 drivers based on which drivers had the greatest number of missed days in the last year and a half. It thus precluded the drivers' bargaining agent from questioning the number of drivers chosen to be laid off, the number of missed days that would be determinative and indeed whether those days were excused absences or not. Moreover, the Respondent precluded any inquiry as to whether another standard, such as seniority, could be used in determining who would be released. These are traditional bargaining issues. Although Respondent gave the Union prior notice of its intent to release employees, it refused the Union's request to bargain on that issue, presenting the Union with a fait accompli and arrogating to itself the standards to be used in releasing employees.

The Respondent also unilaterally eliminated the standby driver program, which it had used in the past to discipline and rehabilitate regular drivers who had problems with excessive absenteeism. Apart from that program, it had never before precipitously terminated or otherwise disciplined drivers for excessive absenteeism. On this issue, Respondent did not even give the Union advance notice; it simply announced that it was ending the program. The elimination of the standby program not only resulted in the termination of drivers in the program, but it ended Respondent's past practice—the benign treatment of those drivers with excessive absenteeism. There can be no doubt that elimination of the program changed the terms and conditions of employment of all employees, not just those who were terminated. In this respect, the standby driver program was effectively a disciplinary system for excessive absenteeism. The Respondent's refusal to bargain on the standby driver program precluded the Union from exploring opportunities as to how to handle excessive absenteeism. The continuation of the standby driver program, especially as it affected how excessive absenteeism was defined and treated, was thus a separate mandatory subject of bargaining. It is well established that an employer's disciplinary system constitutes a term of employment that is a mandatory subject of bargaining. *Toledo Blade Co.,* 343 NLRB 385, 387 (2004).[7]

[5] The parties spent an inordinate portion of their briefs dwelling on whether the terminations were layoffs or discharges. As I have indicated, the terminology used to describe the terminations is not significant.

[6] Respondent contends that its need to reduce employees did not turn on labor costs because the decision did not have anything to do with wage levels or benefit costs (Br. 27). The contention defies reason. Terminations or layoffs of employees wipe out the entire labor cost associated with their employment.

[7] Respondent inexplicably denies in its brief (Br. 31–33) that it eliminated the standby driver program. Cervone's uncontradicted testimony clearly shows the contrary—Jans told Cervone at the June 11 meeting that he had eliminated the program. Jans effectively admitted as much (Tr. 117–118). To the extent that Respondent argues that elimination of the standby driver program was accomplished by Pace or some other entity outside of Respondent's control, the argument is without merit. Respondent submitted no evidence that the new PACE

Significantly, Respondent implemented its decisions to lay off or terminate employees based on excessive absenteeism and to eliminate the standby driver program, essentially a disciplinary system for absenteeism, unilaterally, even though it was in the midst of negotiations. Indeed, the parties had bargained, sometimes with tentative agreements, on the very matters unilaterally implemented by Respondent—layoffs, discipline of employees, and standby driver status.

Because there is no doubt that Respondent undertook unilateral action and refused to bargain with the Union on the layoffs or terminations and elimination of the standby driver program, and because those subjects were mandatory subjects of bargaining, it falls to Respondent to prove that its unilateral actions were somehow privileged. Respondent's defense is basically two-fold: The decisions involved were entrepreneurial or managerial and thus not bargainable; and the unilateral actions were required and not bargainable because of exigent or extraordinary circumstances. Neither argument is persuasive.[8]

Respondent's entrepreneurial or managerial argument is based on its reading of *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981). In that case, the Supreme Court held that an employer did not have to bargain about its decision to terminate its maintenance contract with a nursing home because of a dispute over the size of the maintenance fee the nursing home was to pay the employer. As a result, the employer terminated its entire union-represented work force at the nursing home. Even though the decision clearly impacted the jobs of the union-represented employees, the union had no control or authority over the maintenance fee that caused the employer to cut its relationship with the nursing home. The Court thus concluded that the management decision involved in that case was not amenable to the bargaining process. This case is wholly different, as shown by the Board's analysis in *Lapeer,* which barely mentioned *First National Maintenance*, a case decided seven years before *Lapeer*. Unlike *First National Maintenance*, where the employer's decision to cut its relationship with the nursing home resulted in the loss of employment of all of the employees working there, the Respondent's decision to terminate some, but not all, of its employees, was not compelled by the loss of a contract. Respondent actually won the PACE contract. It knew when it bid on the new contract that it would have less business than it had before the contract, but it made a decision that it nevertheless wanted that contract. But that loss of business was not the type of discrete event that would have amounted even to a partial closing. The layoff of 40 employees involved, at most, 10 percent of Respondent's workforce. Even its initial decision to lay off 40 employees was reversed when Respondent decided it needed more drivers. But both of these decisions—the initial layoff and the subsequent recall of drivers—were made in the context of the new contract. Here, unlike in *First National Maintenance*, the Union is not asking to bargain over a decision to continue in business; it is asking to bargain over decisions to lay off employees and to eliminate a disciplinary system governing excess absenteeism.

Respondent keys on the following quote from *First National Maintenance* (452 U.S. at 676–677), after the Court discusses two types of management decisions that are clearly bargainable:

> The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination [of the contract with the nursing home], but had as it focus only the economic profitability of the contract . . . , a concern wholly apart from the employment relationship. This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, "not in [itself] primarily about conditions of employment, though the effect of the decision may be necessary to terminate employment." [citation omitted]

The Respondent also quotes extensively from another portion of the decision, where the Court speaks of the employer's freedom to make some management decisions without bargaining, ending with the following (452 U.S. at 678–679):

> Nonetheless, in view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

Respondent has cited no cases that have applied the above quoted principles of *First National Maintenance* to find no bargaining obligation in circumstances that in any way approach the facts in this case. In fact, outside of *First National Maintenance* itself, Respondent has cited no cases at all on the matter. Unlike *First National Maintenance*, this case—which involves the termination of employees and elimination of a standby driver program assertedly because of excessive absenteeism—does not amount to a change in the scope and direction of Respondent's business. Nor does conversion to the Trapeze system, required by the new PACE contract, to the extent relevant at all to the decisions to terminate employees and eliminate the standby driver program, amount to a change in the scope and direction of its business. Trapeze is simply a new dispatch system. Respondent continues, as before, to transport disabled people under a contract with a government entity. It also continues to transport people by utilizing busses and driv-

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contract called for the elimination of the standby driver program or mandated the treatment of excessive absenteeism in any way. In any event, Respondent's concern that its operations could no longer tolerate the standby driver program is no excuse for unilateral action, particularly since the program basically provided a disciplinary solution to the problem of excessive absenteeism. Respondent's elimination of the program changed past practice and resulted in Respondent arrogating to itself the treatment of excessive absenteeism. Respondent's elimination of the standby driver program also implicated other bargainable issues—the use of overtime and possible recall of laid-off employees to fill unexpected needs. Almost immediately after the elimination of the standby driver program, Respondent had need for more drivers. According to Jans, until he reinstated some drivers in July 2008, he was using full time drivers who were getting "overtime in the short-term." Tr. 115.

[8] Respondent concedes that it is required to bargain over the effects of at least the decision to terminate the 40 employees (Br. 36).

ers. And its need for fewer drivers—essentially, an economic decision based on its desire to reduce labor costs—was nevertheless suddenly reversed when, as Jans admitted, it needed more drivers shortly after unilaterally deciding to terminate or lay off 40 of them. Moreover, the layoff or termination decision, as well as the decision to eliminate the standby driver program, was clearly amenable to the bargaining process. As discussed above, Respondent's refusal to bargain precluded the Union from discussing other alternatives to the ones unilaterally made by the Respondent. Indeed, the parties had bargained over those very subjects earlier in these very negotiations. Thus, the benefits of bargaining over the layoffs and the standby driver program clearly outweigh the supposed burdens on the employer. See *Winchell Co.*, 315 NLRB 526 (1994), enf'd 74 F.3d 1227 (3rd Cir. 1995); *Holmes & Narver*, 309 NLRB 146, 147 (1992); *Mid-State Ready Mix*, 307 NLRB 809, 810 (1992), cases cited by the General Counsel as examples of decisions like those herein that were found bargainable, despite contentions that they were solely management prerogatives and not amenable to bargaining.

I also reject any contention that exigent or extraordinary circumstances justified Respondent's unilateral actions. Respondent knew when it bid on the new PACE contract that it would suffer a loss of business. It also knew that the new Trapeze computer system would require a different kind of dispatch process. Yet it took no action until about a year later when it precipitously terminated employees, something it had never done before for excessive absenteeism, except in the context of the unilaterally eliminated standby driver program. Here again, Respondent cited no cases in support of its position. But the General Counsel has cited several showing that the narrow and limited exception that would excuse bargaining over otherwise mandatory subjects applies only to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring the employer] to take immediate action.'" *Alpha Associates*, 344 NLRB 782, 785 (2005). As the Board stated in *Alpha Associates*, "Absent a dire financial emergency, the Board has held that economic events such as the loss of significant accounts or contracts, operation at a competitive advantage, or supply shortages do not justify unilateral action." Ibid, citing from *RBE Electronics*, 320 NLRB 80, 81 (1995). Nothing in Respondent's decisions to terminate drivers for excessive absenteeism and to end its standby driver program even remotely qualifies under the Board's limited exception permitting unilateral action.

In these circumstances, I find that the Respondent violated Section 8(a) (5) and (1) of the Act by unilaterally laying off or terminating 40 employees in April 2008 and eliminating the standby driver program. The Respondent violated the Act by refusing to bargain over the decisions in this respect and their effects.

In its brief, Respondent does not contest the allegation that it failed adequately to provide information to the Union relevant to it bargaining concerns. Respondent thus failed to provide a list of the current schedule of all drivers or what the new schedules would be; an explanation of how the schedules were to be adjusted; or the attendance record of all the drivers. Such failure amounted to a separate violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally laying off or terminating 40 employees in April 2008 and eliminating its standby driver program and refusing to bargain with the Union over those decisions and their effects.

2. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the following information requested by the Union that is necessary and relevant to its obligation to bargain on behalf of the employees it represents: A list of drivers and their current and proposed schedules; an explanation of how the schedules are adjusted; and the attendance records of all its drivers.

3. The above violations are unfair labor practices affecting commerce within the meaning of the Act.

REMEDY

Having found that Respondent violated the Act in certain respects, I shall recommend that it cease and desist from engaging in such violations, take affirmative action to remedy them, and post an appropriate notice. The Respondent will be ordered to bargain with the Union concerning the decisions to lay off or terminate employees and to eliminate the standby driver program, as well as the effects of those decisions. The Respondent will also be ordered to reinstate the unilaterally eliminated standby driver program, which operated as a disciplinary procedure for excessive absenteeism. In addition, the Respondent will be ordered to reinstate the laid off or terminated employees and make them whole for any losses they may have suffered, in accordance with *Lapeer Foundry & Machine*, 289 NLRB 952, 955–956 (1988).[9]

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended:[10]

ORDER

The Respondent, Cook DuPage Transportation Company, its officers, agents, successors and assigns shall:

1. Cease and desist from

(a) Refusing to recognize or refuse to bargain with the Union as the exclusive bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part time drivers employed by the Respondent at its facility currently located at 1200 W. Fulton, Chicago, Illinois, but excluding all clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

[9] It appears that Respondent made reinstatement offers to the laid off or terminated employees in July 2008. I make no judgment concerning whether those offers were valid or operated to toll any backpay owing to the employees. Those issues may be raised in the compliance phase of this case.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Unilaterally laying off or terminating employees and eliminating its standby driver program without providing the Union with notice and opportunity to bargain about the decisions to lay off or terminate employees and to eliminate the standby driver program, and the effects of those decisions.

(c) Refusing to provide the following information requested by the Union that is necessary and relevant to its obligation to bargain on behalf of the employees it represents: A list of drivers and their current and proposed schedules; an explanation of how the schedules are adjusted; and the attendance records of all its drivers.

(d) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed them by the Act.

2. Take the following affirmative action necessary for effectuate the policies of the Act

(a) Recognize and, on request, bargain with the Union as the exclusive bargaining representative of the employees in the above-described unit with respect to rates of pay, wages, and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request, bargain with the Union concerning the decision to lay off or terminate employees in April 2008 and the decision to eliminate the standby driver program, and the effects of those decisions.

(c) Reinstate the standby driver program that was unlawfully eliminated.

(d) Reinstate and make whole those employees laid off in April 2008, for any loss of pay or other employment benefits suffered as a result of its unlawful conduct in the manner set forth in the remedy portion of this decision.

(e) Furnish to the Union in a timely manner the following information requested by it: A list of drivers and their current and proposed schedules; an explanation of how the schedules are adjusted; and the attendance records of all its drivers.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay and other moneys due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 13 after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 2008.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 12, 2009.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize or refuse to bargain with the Union as the exclusive bargaining representative of the employees in the following appropriate unit

> All full-time and regular part time drivers employed by the Respondent at its facility currently located at 1200 W. Fulton, Chicago, Illinois, but excluding all clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally lay off or terminate employees and eliminate our standby driver program without providing the Union with notice and opportunity to bargain about the decisions to lay off or terminate employees and to eliminate the standby driver program, and the effects of those decisions.

WE WILL NOT refuse to provide the following information requested by the Union that is necessary and relevant to its obligation to bargain on behalf of the employees it represents: A list of drivers and their current and proposed schedules; an explanation of how the schedules are adjusted; and the attendance records of all of our drivers.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights guaranteed them by the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive bargaining representative of the employees in the above-described unit with respect to rates of pay, wages, and other terms and conditions of employment, and, if an un-

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

derstanding is reached, embody the understanding in a signed agreement.

WE WILL, on request, bargain with the Union concerning the decision to lay off or terminate employees and the decision to eliminate the standby driver program, and the effects of those decisions.

WE WILL reinstate the standby driver program, which we unlawfully eliminated.

WE WILL reinstate and make whole those employees laid off in April 2008, for any loss of pay or other employment benefits suffered as a result of our unlawful conduct, with interest.

WE WILL furnish to the Union in a timely manner the following information requested by it: A list of drivers and their current and proposed schedules; an explanation of how the schedules are adjusted; and the attendance records of all its drivers.

COOK DUPAGE TRANSPORTATION COMPANY